No. 90-498

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF SOUTH CAROLINA,

Petitioner,

v

HORACE BUTLER,

Respondent.

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## RESPONDENT'S STATEMENT OF THE ISSUES PRESENTED

I.

Does the South Carolina Supreme Court's decision to grant extraordinary relief based on what the state court found to be the "unique and compelling facts" of respondent's case warrant intervention by this Court?

II.

Does South Carolina's application of its own prophylactic rule of reversal in this case present a substantial federal question?

III.

Does the South Carolina Supreme Court's refusal to disregard as harmless a trial judge's coercive statements to a confused and mentally retarded capital defendant present an issue worthy of review by certiorari?

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RESPONDENT'S STATEMENT OF THE CASE

I. Relevant Procedural History.

Respondent Horace Butler filed a petition for writ of habeas corpus challenging his convictions and sentence of death in the original jurisdiction of the South Carolina Supreme Court on May 9, 1990, pursuant to S.C. Const. art. V, §5 (1976), and S.C. Code §14-3-310 (1976).[1] His petition was based upon the fact that the record of his trial revealed an error identical to one which later led the South Carolina Supreme Court to reverse the convictions and death sentences imposed in State v. Pierce, 289 S.C. 430, 346

[1]Respondent's petition for writ of habeas corpus, the state's response and respondent's reply are attached as appendices to this brief.

S.E.2d 707, 710 (1986), and State v. Cooper, 291 S.C. 332, 353 S.E.2d 441, 443 (1986). See also State v. Gunter, 286 S.C. 556, 335 S.E.2d 542 (1985) (non-capital conviction reversed due to same error by same judge). As will be set forth in more detail below, the error involved comments by the trial judge, the Honorable C. Anthony Harris, as to how the jury would likely view respondent's decision not to testify.

The South Carolina Supreme Court agreed that Judge Harris committed the "identical error" in respondent's case as in the South Carolina precedents cited, and noted that, "if anything, the error [in respondent's case] was more egregious" than in Pierce, Cooper and Gunter since respondent is mentally retarded, and because "[a] review of the colloquy in light of this fact (unknown to the trial judge at the time) raises serious questions whether petitioner even understood the proceedings." Order at 2; App. to Pet. for Cert. at 38. Accordingly, the state supreme court granted the writ of habeas corpus and ordered a new trial on the basis of the "unique and compelling circumstances" of respondent's case. Order at 3; App. to Pet. for Cert. at 39. With this action, respondent's case became the only capital case since Furman v. Georgia, 408 U.S. 238 (1972), in which the South Carolina Supreme Court has granted a petition for writ of habeas corpus in its original jurisdiction. Respondent also appears to be the only capital defendant ever to obtain relief by means of a successive collateral attack on a conviction or death sentence in the courts of South Carolina.

II. The Decision of the South Carolina Supreme Court.

**A. Facts relevant to the claim upon which the state court granted habeas relief.**

Respondent was tried for the murder of Pamela Lane. When his trial counsel announced that the defense intended to rest without calling respondent to testify on his own behalf, the trial judge initiated a lengthy monologue in which he warned respondent no fewer than seven separate times that the jury would likely hold his failure to testify against him, regardless of the instructions of the court. App. to Pet. for Cert. at 41-50; Transcript of Record, State v. Horace Butler (hereinafter cited as "Tr.") at 871-877. Throughout most of this discussion, respondent was obviously confused and bewildered: other than "Yes, sir," all of his responses were to the effect that he did not understand, Tr. 872, line 21, Tr. 873, lines 11-12, that he could not answer, Tr. 873, lines 23-25, that he wanted to go into a room to talk to his lawyer, Tr. 874, lines 21-24, and that he wanted the judge to repeat his questions. Tr. 876, line 9. The record before the South Carolina Supreme Court (though not before the trial judge or jury) revealed that Horace Butler is mentally retarded, with a full-scale I.Q. of 61. Butler v. State of South Carolina, Order at 2; App. to Pet. for Cert. at 38 n.1.

Respondent ultimately did not testify in the guilt-or-innocence phase of the trial. However, he subsequently gave up his right to remain silent by making a very brief unsworn statement to the jury at his sentencing hearing, which he began by blurting out, "This crime which I did, I didn't do it." Tr. 1015. Prior to this

statement, the trial judge advised respondent of his right to testify or not, and of his right to make a closing statement. However, the judge did not advise him of his right to decline to make any statement at all. In addition, the judge neither retracted nor modified his earlier admonitions about the peril in which respondent would place himself if he failed personally to tell the jury his side of the story. Tr. 994, line 10.

In late 1985, after respondent had exhausted his then-available state remedies, the South Carolina Supreme Court held for the first time that a substantially identical series of statements made to a criminal defendant by the same trial judge who presided over respondent's case constituted reversible error. State v. Gunter, 286 S.C. 556, 335 S.E.2d 542 (1985). The core of the state court's holding is as follows:

> How a jury may or may not view a defendant's decision not to testify is not an appropriate subject for comment by the court. A statement by the trial judge which intimates that the jury will ignore his instructions is improper. As stated in Carter [v. Kentucky], supra, 450 U.S. at 301, 101 S.Ct. at 1120, "we have not yet attained that certitude about the human mind which would justify us in . . . a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court. . ."
>
> In the present case, this court is of the opinion that the comments of the trial judge constitute reversible error because he exceeded the scope of his authority to instruct the appellant as to his Fifth Amendment rights.

286 S.C. at 560, 335 S.E.2d at 543.

In State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986),

decided the next year, the South Carolina Supreme Court again held that Judge Harris had committed reversible error when he advised the defendant as follows:

> I tell you that the jury will hold it against you, the fact that you did not testify . . . . I am going to charge them that the law does not permit them to hold it against you, but they are human beings and you know and I know that any twelve people who have been called upon to resolve some dispute cannot help but wonder why he did not tell us his side of it.

289 S.C. at 434, 346 S.E.2d at 710. The court characterized these comments as "erroneous, improper and contrary to South Carolina law." 289 S.C. at 434, 346 S.E.2d at 710. The court also rejected the state's claim that these potentially coercive statements should be disregarded as harmless because the defendant ultimately did not testify:

> Although Pierce did not testify, he had the right to make that decision free of any influence or coercion from the trial judge. It is virtually impossible to determine the actual effect the judge's improper statements had on Pierce; but we do not agree with the state's position that, because Pierce did not testify, the judge's comments are harmless error.

Id. Four months later, confronted with a virtually identical fact situation in another capital case tried by Judge Harris, the state court handed down a decision reaffirming its prior holdings in Gunter and Pierce. State v. Cooper, 291 S.C. 332, 336-37, 353 S.E. 2d 441, 443 (1986). In Cooper, as in Pierce, the defendant did not testify in the guilt phase of the trial after hearing Judge Harris's coercive statements, but did make a statement to the jury at the sentencing phase of the trial. The Cooper court reaffirmed

its refusal to disregard the comments as harmless under these circumstances and reversed.

In respondent's case, the South Carolina Supreme Court simply acknowledged that Judge Harris' comments violated the principles established in Gunter, Pierce and Cooper. Finding that the error in respondent's case was, if anything, more egregious than the violations in the previous cases, and in view of the "unique and compelling circumstances" of respondent's case, the state court granted the petition for writ of habeas corpus.

### B. The "unique and compelling circumstances of this case" which impelled the South Carolina Supreme Court to grant relief.[2]

As noted above, the South Carolina Supreme Court described its decision to grant habeas relief as based on the unique and compelling circumstances of [Horace Butler's] case." Order at 3; App. to Pet. for Cert. at 39. The circumstances to which the state supreme court referred may be summarized as follows.

Respondent was convicted of murder and sentenced to death for the July 17, 1980, murder of Pamela Lane. After his arrest for an unrelated charge (later dismissed), respondent retained a local attorney, W. McAlister Hill, to represent him. Charleston County police waited until minutes after Mr. Hill left the jail before beginning an all-night interrogation which eventually produced an

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[2]This evidence was presented to the South Carolina Supreme Court by means of both the petition for writ of habeas corpus and an application for post-conviction relief which was filed in the trial court and provided to the state supreme court. Copies of both the state habeas and post-conviction relief papers are included in the appendix to this petition for this Court's convenience.

incriminating statement. In accordance with a standing order from the prosecutor's office, the police tape-recorded neither the statement nor the interrogation which produced it. After respondent made his incriminating statement, Charleston authorities charged him with Ms. Lane's murder.

Mr. Hill served as respondent's counsel in connection with the murder charge. This was Mr. Hill's first murder trial and he had limited felony experience.[3] No other attorneys assisted or participated in Hill's representation of respondent. The state originally placed the case on the trial roster for the first week of December of 1980 as a non-capital offense. However, the state declined to call the case when it was scheduled, and instead filed a notice of intent to seek the death penalty. The state then rescheduled respondent's case for January of 1981, and called it for trial on January 19 before the Honorable C. Anthony Harris and a jury.

In support of its demand for the death penalty, the state relied upon the statutory aggravating circumstances of kidnapping and rape. Immediately prior to trial, however, the state moved that the charges of kidnapping and rape be taken off the active trial roster until the disposition of the murder charge. This

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[3]Mr. Hill was admitted to the bar in 1974. He testified at the original post-conviction relief hearing that he had been involved in seven or eight felony cases prior to representing Mr. Butler, only two of which went to trial. Thus he would not have qualified for appointment in South Carolina as Mr. Butler's lead counsel pursuant to the criteria set forth in S.C. Code §16-3-26(B). See also State v. Diddlemeyer, 296 S.C. 235, 371 S.E.2d 793 (1988).

sequence of events suggests that the state recognized that its evidence regarding kidnapping and rape was weak, and thus decided not to expose those charges to the jury at the guilt-or-innocence phase of respondent's trial.

The state's evidence consisted largely of the testimony of Larry White,[4] and of respondent's own statements. White was charged as an accessory after the fact of murder. He testified at trial that he had been promised nothing in exchange for his testimony. However, the charges against him were later dismissed.

Despite respondent's uncounseled and unrecorded confession (in which he admitted shooting Lane after what he claimed to have been consensual sexual relations), the state's physical evidence was in some respects problematic. First, while the state maintained that respondent perpetrated this crime alone, an FBI hair identification expert testified that a Negroid pubic hair found on the victim's clothes "absolutely" did not come from respondent. The witness could not, however, exclude Larry White as a source of the pubic

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[4]Larry White testified that respondent Butler came and picked him up at a lounge called "the Whiz" in the Adams Run section late in the evening on July 17th. According to White, respondent told him that he needed White to help him do something. White left with respondent in respondent's car. White maintained that respondent took him to the victim's moped and asked him to help him dispose of it. White helped respondent push the moped in the marsh. White testified that it was only after the moped had been disposed of did he learn from respondent that Pamela Lane was dead. White also testified that respondent told him he had accidentally hit Ms. Lane while driving down the road. He stopped, and after he determined that she was probably not going to survive, he shot her.

It is important to note that respondent would not have needed White's help to dispose of the moped. Ms. Lane's sister testified that she could easily lift the moped by herself. In fact, she had loaded it into her car by herself and brought it to Pamela on July 17th.

hair.[5] Second, the state failed to carry out a simple blood factor test on the victim to prove or disprove the prosecution's theory that blood factors found in her vagina came from her and not from a third person.[6] Third, the pathologist testified that the autopsy did not reveal any evidence of forcible sexual relations. While he maintained that this was not absolutely inconsistent with rape, he did state that in his experience there were usually signs of vaginal tearing or abrasions in cases involving forced sexual activity.[7] Fourth, the victim's brand-new moped bore paint scrapings which were inconsistent with the paint on respondent's automobile.

Respondent was convicted of Ms. Lane's murder on January 24, 1981. At the conclusion of the guilt-or-innocence phase of the trial, Judge Harris determined that the state did not have sufficient evidence to submit the statutory aggravating

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[5]Additionally, evidence presented at the original post-conviction relief hearing revealed that Larry White, not Horace Butler, was known to carry a .22 caliber pistol, which was the type of weapon used in the murder of Pamela Lane. Furthermore, Ms. Lane's shoes were found near a bar called "the Whiz." Larry White worked at "the Whiz."

[6]Semen found in the victim's vagina was found to contain Type A blood factors. Respondent has Type O blood and is a non-secretor, which means that he does not secrete his blood factors into bodily fluids such as semen. The victim had Type A blood. Thus the state postulated that the Type A blood factor in the semen came from Ms. Lane's own vaginal secretions. However, for unknown reasons, the state's investigators did not test Ms. Lane's remains to determine whether she was a secretor. If she was not a secretor, the semen found in the victim's body would have had to have come from a male with Type A blood, and thus could not have come from respondent.

[7]He stated: There was "no evidence of trauma normally found in forced sexual intercourse."

circumstance of kidnapping to the jury. Tr. 972. Judge Harris also stated that he was extremely skeptical as to the sufficiency of the evidence of rape. Id. However, after deliberating overnight, he ultimately determined that he would allow the rape aggravating circumstance to be submitted to the jury.

The state presented no additional evidence in aggravation of punishment during its sentencing phase case-in-chief. The mitigation case presented by Mr. Hill lasted approximately 10 minutes, and consisted of a stipulation that the victim had attempted suicide on two occasions, and the testimony of a school principal that respondent dropped out of school at age 16 in the fourth grade. As was presented in detail to the South Carolina Supreme Court in these habeas corpus proceedings, the jury was not apprised that:

> * respondent is mentally retarded with a full-scale I.Q. of 61, and a mental age of less than a nine-year-old child;
>
> * he is brain-damaged and mentally ill; and,
>
> * he was raised in conditions of abject poverty, deprivation, and profound social isolation.

See Application for Post-Conviction Relief at 24-44; D-1.[8] Essentially, the jury's sentencing decision was made without benefit of any substantial information about the person whose life rested in their hands.

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[8]After being apprised of the results of psychological and neuropsychological testing conducted after petitioner's trial, the South Carolina Supreme Court concluded, "A review of the colloquy in light of [respondent's mental condition] raises serious questions whether petitioner even understood the proceedings." Order at 2; App. to Pet. for Cert. at 38.

The jury deliberated for approximately three hours before returning with a verdict of death. After accepting the sentence of death, the trial judge made the following comment to the jury:

> Your responsibility to the state and to the defendant is concluded when you arrive at a verdict. As I say, it is a proper one under the evidence. Another verdict would have been proper, depending upon your views of the facts and applying the law as I gave it to you.

Tr. 1037 (emphasis added). Thus, the trial judge's actions and comments throughout respondent's trial suggest that, even without the benefit of the wealth of mitigating information later presented to the South Carolina Supreme Court in this habeas proceeding, the judge personally believed this to be a case in which a life sentence would have been entirely appropriate.

## REASONS THE WRIT SHOULD BE DENIED

### I. This Case Presents No Substantial Federal Question, Because the Decision of the South Carolina Supreme Court Rested on an Adequate and Independent State Ground.

It is, of course, well settled that this Court will not consider an issue of federal law when reviewing a judgment of a state court if that judgment rests on an adequate and independent state law ground. See, e.g., Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038 (1989); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874). The independent and adequate state ground rule is a corollary of the fundamental principle that this Court lacks jurisdiction to review matters of state law. As the Court noted in Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945), the Supreme Court's inability to review

such state court judgments

> is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review would amount to nothing more than an advisory opinion.

A review of the decision in respondent's case and its progenitors reveals that the Supreme Court of South Carolina was doing nothing more than holding, as a matter of state criminal procedure, that a trial judge in a criminal case may not comment on how a jury will view a defendant's exercise of his Fifth Amendment right not to testify, and that if he does, a defendant is entitled to a new trial. Neither this state-created rule nor its application to the facts of this case presents a substantial federal question.

The starting point is State v. Gunter, supra. In Gunter, the South Carolina Supreme Court, in considering the appropriateness of Judge Harris' comments, concluded:

> State law mandates that, if a defendant fails to take the stand in his own defense and requests a charge to that effect, the trial judge must instruct the jury that his failure to testify cannot be held against him or considered by the jury in any manner during their deliberations. How a jury may or may not view a defendant's decision not to testify is not an appropriate subject for comment by the court. A statement by the trial judge which intimates that the jury will ignore his instructions is improper.

286 S.C. at 559, 335 S.E.2d at 543. The state law nature of the South Carolina Supreme Court's holding is further made apparent by its statements in Pierce, Cooper and respondent's case that Judge Harris' comments were "erroneous, improper and contrary to South Carolina law." See Pierce, 289 S.C. at 434, 346 S.E.2d at 710; Cooper, 291 S.C. at 336, 353 S.E.2d at 443; Butler, Order at 2; App. to Pet. for Cert. at 37.

What the South Carolina Supreme Court did in these four cases was develop and enforce a state prophylactic rule designed to insure the protection of a federal constitutional right. Cf. Delaware v. Van Arsdall, 475 U.S. 673, 678 n.3 (1986) (rejecting claim that state court's harmless-error determination rested on state law where opinion "nowhere suggests the existence of a state prophylactic rule designed to ensure protection for a federal constitutional right"). The Attorney General conceded as much in its pleading filed in the state court when it described the South Carolina Supreme Court's decisions as establishing an "apparent prophylactic rule." State's Return at 15, B-1.[9] This characterization is abundantly supported by South Carolina law.

Gunter, Cooper and Pierce make clear that the South Carolina Supreme Court has decided as a matter of state law that a trial judge should not comment on how a jury may or may not view a

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[9]Furthermore, despite petitioner's contentions in this Court that respondent asserted below that the trial judge's comments violated the Fifth Amendment, petitioner complained in the South Carolina Supreme Court that respondent had failed to identify the constitutional right alleged to have been violated. Return at 5, B-1.

defendant's decision not to testify. The state court further held, again as a matter of state law, that if the trial judge does so comment, it will not, under most circumstances, engage in a harmless-error analysis. "A State, of course, may apply a more stringent state harmless-error rule than Chapman [v. California, 386 U.S. 18 (1967),] would require." Connecticut v. Johnson, 460 U.S. 73, 91 (1983) (Powell, J., dissenting) (emphasis in original). That is just what the South Carolina Supreme Court did here. The state court's decision to preclude trial judges from making this type of comment regarding the protections of the Fifth Amendment, and to enforce this preclusion with a rule of reversal, does not present a federal question. Therefore this Court lacks jurisdiction to entertain the state's complaint concerning the decision of the South Carolina Supreme Court, and the petition for writ of certiorari should be denied.[10]

II. There are no Special and Important Reasons Warranting Certiorari in this Case.

Rule 10 of the Rules of this Court makes clear that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion," and "will be granted only when there are special and important reasons therefor." Id.[11] In addition to

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[10]The state law basis of the South Carolina Supreme Court's decision is underscored by the Attorney General of South Carolina's failure to petition this Court for a writ of certiorari following the decisions in Gunter, Pierce or Cooper.

[11]Rule 10 states in pertinent part:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are

the fact that there is no federal question involved in this case, and thus no jurisdictional basis for intervention by this Court, none of the reasons set forth in Rule 10 warrant certiorari in this case. Respondent's case involves no important or substantial question of "federal law which has not been, but should be, settled by this Court." Nor did the South Carolina Supreme Court decide on a federal question in a way that conflicts with applicable decisions of this Court.

The importance of the issues involved in the case as to which review is sought is of major significance in determining whether certiorari should issue. This Court, obviously, cannot give full consideration to all cases which present novel or interesting issues, and must necessarily confine itself to cases which reflect important legal problems within the realm of its jurisdiction. Furthermore, the problem, though intrinsically important, must be "beyond the academic or the episodic." Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955). While there is no formula which reveals the precise amount of importance that will move the Court

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special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

* * *

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

to grant certiorari, the existence of admittedly "serious legal questions" is not, in and of itself, sufficient. English v. Cunningham, 361 U.S. 905, 907 (1959). Furthermore, importance is a relative factor, dependent upon the type of issue involved, the way in which the claim was decided below, the status of the law on the matter, the correctness of the decision below, and the nature and number of persons who may be affected by the case. See Stern, Gressman & Shapiro, Supreme Court Practice (6th Ed.) at 212-13.

Respondent's case involves only the idiosyncratic remarks of a single South Carolina state trial judge regarding how a jury might view a defendant's decision not to testify. It is the last in a series of four cases involving comments by this same judge. The South Carolina Supreme Court was well aware of this fact when it rendered its decision granting habeas relief in respondent's case. Thus the ruling of the South Carolina Supreme Court affects no one except Horace Butler, a mentally retarded death row inmate.

Furthermore, the decision of the South Carolina Supreme Court was based not only on the violation of the principles it had delineated in Gunter, Pierce and Cooper, but also on the totality of the circumstances of respondent's case, including the basic injustice of respondent's sentence of death. In the pleadings filed in the state courts, respondent set forth a number of reasons why his conviction and sentence of death violated principles of basic fairness. These included the tenuousness of the evidence of rape on which his sentence rests; the almost total lack of mitigating evidence presented at the sentencing phase of his trial,

despite the fact that petitioner is mentally ill and mentally retarded, and has a background of the most extreme deprivation; and the muddled and idiosyncratic defense provided by petitioner's inexperienced trial counsel. It was for all these reasons that the South Carolina Supreme Court concluded that respondent was entitled to relief based on "the unique and compelling circumstances" of his case. Butler v. State, Order at 2; App. to Pet. for Cert. at 39.

For these reasons, respondent's case does not satisfy any of the criteria set forth in Rule 10 of the Rules of this Court. Based on all the circumstances, the South Carolina Supreme Court concluded that there was a "`violation, which, in the setting, constitute[d] a denial of fundamental fairness shocking to the universal sense of justice.'" Butler v. State, supra, at 39 (quoting State v. Miller, 16 N.J. Super. 251, 84 A.2d 459 (N.J. Super. Ct. A.D. 1951) (emphasis added by South Carolina Supreme Court)). Therefore, because there are no special and important reasons warranting the granting of certiorari in this case, the petition should be denied.

Finally, the fact that the South Carolina Supreme Court was so obviously motivated by a desire to reach a fundamentally fair result means that there is no likelihood that any different judgment would ultimately be reached on remand should this Court grant certiorari and disapprove the legal reasoning which led the state court to grant relief. This is particularly plain in the state court's remarks concerning the legal significance of respondent's mental retardation. Citing newly-acquired information

about respondent's severe mental disabilities, the state court discerned "serious questions whether [respondent] even understood the proceedings" when he made his decision whether to testify at his capital trial. Butler v. State, Order at 2; App. to Pet. for Cert. at 39. At this same time, the court cited South Carolina case law which requires special care in accepting waivers of constitutional or statutory rights from mentally retarded defendants, State v. Arthur, 296 S.C. 495, 374 S.E.2d 291 (1988). Butler v. State, Order at 2-3; App. to Pet. for Cert. at 37-38. This discussion makes clear that the South Carolina Supreme Court has already found the conduct of respondent's trial insufficiently responsive to his mental retardation--retardation of which the trial judge was unaware during the guilt phase of the trial.

Under these circumstances, it is inconceivable that the South Carolina Supreme Court's view of the basic equities of this case will be so transformed by any intervening critique of its legal analysis that the state court would order petitioner's electrocution on remand.[12] The intervention prayed for by the Attorney General stands no chance of affecting the result of these proceedings, and amounts to a request that this Court review not the judgment of the South Carolina Supreme Court but its opinion. Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). In view of the state law basis of the South Carolina Supreme Court's judgment, the lack of any substantial reason why certiorari should be granted,

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[12]The present petition for habeas corpus was filed in response to the state's motion to set a date for his execution.

and the fact that the state court's judgment has at last afforded the opportunity for substantial justice in this case, the state's effort to have this Court review the basis of the South Carolina Supreme Court's ruling is without merit.

## CONCLUSION

For all the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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* Counsel of record

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Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the brief in opposition to the petition for writ of certiorari to the Supreme Court of the State of South Carolina in the above captioned matter have been served upon opposing counsel by placing one copy of the same, properly addressed and postage prepaid, in the United States Mail this 17th day of October, 1990.

John H. Blume

Sworn to and subscribed before
me this 17th day of October, 1990.

Catherine A. Gulley
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 6/10/91.

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October 17, 1990



Honorable Joseph F. Spaniol, Jr.
Clerk
Supreme Court of the United States
Washington, DC 20543

Re: State of South Carolina v. Horace Butler
No. 90-498

Dear Mr. Spaniol:

Enclosed please find the original and nine (9) copies of a Brief in Opposition to Petition for Writ of Certiorari and Appendix, with proof of service, in the above captioned matter.

Very truly yours,

John H. Blume

JHB/cag
Enclosure

c: David I. Bruck, Esq.
Donald J. Zelenka, Esq.
Horace Butler